

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KAYLEEN SHAKESPEAR,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

Case No. 2:12-cv-01064-MMD-PAL

ORDER

(Mot. to Exclude Evidence - Dkt. #56)

Before the court is Defendant Wal-Mart Stores, Inc.'s Motion to Exclude all Evidence Regarding Plaintiff Kayleen Shakespear's Future Surgery, Permanent Medical Impairment, and Future Medical Expenses Pursuant to FRCP 37(c)(1) and FRCP 37(b)(2) [Emergency Motion] (Dkt. #56). The court has considered the Motion, Plaintiff's Opposition (Dkt. #60), Wal-Mart's Reply (Dkt. #64), and the arguments of counsel at the hearing held on April 9, 2013. Christian Smith appeared on behalf of the Plaintiff, and Brenda Entzminger appeared on behalf of the Defendant.

BACKGROUND

The complaint in this case was filed in state court and removed (Dkt. #1) June 1, 2012. It asserts claims against Wal-Mart related to a slip-and-fall accident Plaintiff allegedly suffered at a Wal-Mart store in Las Vegas, Nevada on August 5, 2011. Shakespeare contends she slipped and fell on a cherry pit and was injured. The complaint alleges Wal-Mart should have known about the cherry pit and created an unreasonably dangerous condition by failing to exercise due care in maintaining a clear floor. *See* Complaint, attached to Petition for Removal, (Dkt. #1) as Exhibit "B". The court entered a Scheduling Order (Dkt. #9) on August 8, 2012.

Discovery in this case has been contentious. The parties have been unable to agree on routine scheduling and case management matters, and have had multiple discovery disputes which the court has

1 resolved in a series of status and dispute resolution hearings. *See, e.g.*, Minutes of Proceedings (Dkt.
2 ##14, 21, 27, 29 and 65).

3 DISCUSSION

4 **I. The Parties' Positions.**

5 **A. Wal-Mart's Motion to Exclude.**

6 On February 21, 2013, the deadline for disclosing experts, Plaintiff disclosed the reports of two
7 medical expert witnesses who opine Plaintiff will need knee replacement surgery and incur future
8 medical expenses exceeding \$228,000. Wal-Mart was extremely surprised by this disclosure because
9 throughout the litigation, Plaintiff's counsel has affirmatively represented that Plaintiff had ceased
10 medical treatment related to this matter, and affirmatively represented that Plaintiff was not bringing a
11 wage loss claim. Neither Plaintiff's initial disclosures, nor four subsequent supplements identified
12 future medical expenses or wage loss. The parties stipulated to a discovery plan and scheduling order
13 which required Plaintiff to submit to an independent medical examination ("IME") if Wal-Mart
14 discovered that Plaintiff was continuing medical treatment associated with this incident, or if Wal-Mart
15 discovered that Plaintiff was claiming future medical expenses. Because Plaintiff did not make the
16 disclosures until the last day of the expert disclosure deadline, Wal-Mart did not have an opportunity to
17 demand an IME.

18 On the last date for disclosing expert witnesses, Plaintiff disclosed a 51-page report from one of
19 two retained medical experts, Dr. Armando Miciano, which indicates Plaintiff began treatment with
20 him on August 5, 2012, six months prior to the disclosure deadline. Plaintiff also disclosed another
21 retained medical expert, Dr. Hugh Selznick, who reported, for the first time, his estimate of Plaintiff's
22 future medical expenses and treatment recommendations. Dr. Selznick's report indicates that he began
23 treating Plaintiff six months prior to the disclosure deadline and had rendered his future treatment
24 recommendations well before the Plaintiff disclosed this information to Wal-Mart. Under these
25 circumstances, Wal-Mart argues Plaintiff's failure to timely disclose her treatment with these two
26 physicians and their recommendations concerning future treatment and projected future medical
27 expenses should result in excluding this evidence at trial. Wal-Mart also argues that Plaintiff's failure
28 to disclose this information prior to the expert disclosure deadline violated Plaintiff's obligations under

1 Rule 26(a)(1)(A)(iii), prevented Wal-Mart from conducting an IME, and prevented Wal-Mart from
2 disclosing an expert witness before the expert witness disclosure deadline.

3 Counsel for Wal-Mart states that she originally gave counsel for Plaintiff the benefit of the
4 doubt, and offered to stipulate to a plan to avoid any prejudice. Specifically, Wal-Mart offered to
5 stipulate to an extension to allow it to disclose a medical expert after Wal-Mart obtained an IME based
6 on Plaintiff's late disclosures. However, counsel for Plaintiff refused to agree to either a court-ordered
7 IME or to extend the deadline to allow Wal-Mart to designate an expert to address the previously
8 undisclosed treatment and projected future medical expenses. Counsel for Wal-Mart therefore
9 concluded that Plaintiff's late disclosures were calculated to deny Wal-Mart the opportunity to obtain
10 an IME and disclose its own expert to Wal-Mart's prejudice.

11 **B. Plaintiff's Response.**

12 Plaintiff opposes the motion acknowledging that on July 27, 2012, counsel responded to Wal-
13 Mart's inquiry and advised opposing counsel that the Plaintiff was not making a wage loss claim.
14 Counsel for Plaintiff also acknowledges that in the same letter, he advised opposing counsel that the
15 Plaintiff was still experiencing some problems with her right knee, but was not actively treating.
16 Plaintiff was deposed October 4, 2012. During her deposition, she testified that she was still treating
17 with Dr. Ram, her family physician, for right knee complaints, and that Dr. Ram had been prescribing
18 Percocet. She also testified that Dr. Ram had not released her from care, and that her right knee pain
19 sometimes interferes with her activities of daily living.

20 Plaintiff retained Hugh Selznick, M.D., and Armando Miciano, M.D., as her medical experts
21 before the initial October 21, 2012, expert disclosure deadline. That deadline was extended until
22 February 21, 2013. Counsel for Plaintiff explains that these experts were retained to conduct IMEs, to
23 assess causation of injury, reasonableness and appropriateness of past medical care, reasonableness and
24 appropriateness of past medical expenses, whether any future medical care would be needed, and the
25 permanency, if any, of the Plaintiff's injuries. Dr. Selznick conducted his IME September 5, 2012.
26 However, he did not finalize his opinions or finalize his report until February 4, 2013.

27 Dr. Miciano performed his IMEs of the Plaintiff on August 5, 2012, and August 22, 2012, but
28 did not finalize his opinions or evaluations until February 14, 2013, the date he provided his report to

1 counsel for Plaintiff. Plaintiff argues that Wal-Mart did not request an IME of the Plaintiff prior to the
2 initial expert deadline despite being on notice that Plaintiff was still experiencing intermittent right knee
3 pain and was under the care of Dr. Ram. Wal-Mart also did not identify any medical experts on the
4 February 21, 2013, deadline to designate initial experts. Under these circumstances, counsel for
5 Plaintiff argues that her disclosure of future medical care opinions was timely under Rule 26. Counsel
6 also argues that the applicable expert deadline was February 21, 2013, and that Plaintiff complied with
7 his deadline by producing her initial expert reports because this was the first time that this information
8 became "reasonably available." If the court disagrees and "sides with Wal-Mart's position" this would
9 circumvent and make obsolete the expert disclosure deadlines required by Rule 26(a)(2). Alternatively,
10 counsel for Plaintiff argues that, if the court finds Plaintiff's future medical damages computation is
11 untimely, the failure to timely disclose was substantially justified or harmless. Plaintiff also argues that
12 Wal-Mart has not been prejudiced by any late disclosure because it was on notice of the potential for
13 future medical damages and can offer rebuttal opinions. Additionally, there will be no disruption in the
14 trial date as a trial date had not yet been set.

15 **C. Wal-Mart's Reply.**

16 The reply reiterates arguments that the court should exclude all evidence regarding the
17 Plaintiff's proposed future surgery, permanent medical impairment, and future medical expenses under
18 Rule 37(c)(1) and Rule 37(b)(2) because Plaintiff failed to comply with this court's August 8, 2012,
19 Discovery Plan and Scheduling Order (Dkt. #9). Wal-Mart maintains that Plaintiff's opposition does
20 not offer any factual or legal authority to dispute that she violated Rule 26(a)(1)(A)(i), Rule
21 26(a)(1)(A)(ii), Rule 26(a)(1)(A)(iii), Rule 33, and Rule 26(e) by failing to timely disclose future
22 medical expenses in her computation of damages, and the possibility of future knee replacement
23 surgery. Plaintiff also inaccurately responded to Wal-Mart's Interrogatory Nos. 14, 15 and 16 which
24 specifically sought information pertaining to any allegations of permanent impairment, future medical
25 procedures recommended, future medical expenses claimed, and physicians supporting these
26 contentions. She likewise failed to timely supplement her interrogatory responses upon learning they
27 were inaccurate or incomplete. Wal-Mart disputes that the opinions of the two experts were not
28 reasonably available until the last date of the expert disclosure deadline given that both experts

1 examined the Plaintiff as early as August 2012. If Plaintiff's "reasonably available" arguments were
2 accepted by the court, no party would face exclusion sanctions for untimely disclosure under Rule
3 37(c).

4 Counsel for Wal-Mart strenuously maintains that, based on its supporting exhibits, that Plaintiff
5 did not merely forget or neglect to ask for information from its experts in a timely manner. Rather,
6 Wal-Mart believes Plaintiff purposefully withheld the information to prevent Wal-Mart from obtaining
7 an IME early in the case and to prevent Wal-Mart from retaining its own medical expert for its case in
8 chief. Wal-Mart also points out that Plaintiff stipulated, and the court ordered, that Wal-Mart would
9 have an opportunity to conduct an IME under one of two circumstances: 1) if Plaintiff was undergoing
10 medical treatment for injuries alleged from this incident; or 2) if she claimed to have residual medical
11 issues requiring additional medical treatment. Wal-Mart accuses opposing counsel of falsely
12 representing that Plaintiff was no longer treating for the purpose of depriving Wal-Mart of an
13 opportunity to conduct an IME, or to retain an expert for its case in chief. Finally, Wal-Mart contends
14 that it will be irreparably harmed by the evidence Plaintiff withheld until the expert disclosure deadline,
15 and harmed by any extension needed to remedy Plaintiff's late disclosures. Under these circumstances,
16 Wal-Mart argues that exclusion of the withheld information is the only appropriate sanction.

17 **II. Applicable Law and Analysis.**

18 Fed. R. Civ. P. 37 authorizes sanctions for a party's failure to make disclosures or cooperate in
19 discovery. Rule 37(c)(1) provides, in relevant part:

20 A party that without substantial justification fails to disclose information
21 required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery
22 as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted
to use as evidence at a trial, at a hearing, or on a motion any witness or
information not so disclosed.

23 Fed. R. Civ. P. 37(c)(1). Rule 37 "gives teeth" to the disclosure requirements of Rule 26 by forbidding
24 the use at trial of any information that is not properly disclosed. *Goodman v. Staples The Office*
25 *Superstore*, 644 F.3d 817, 827 (9th Cr. 2011). Rule 37(c)(1) is a "self-executing, automatic" sanction
26 designed to provide a strong inducement for disclosure. *Id.* Rule 37(a)(3) explicitly provides that an
27 evasive or incomplete disclosure, answer, or response to a discovery obligation "is to be treated as a
28 failure to disclose, answer, or respond." *Id.*

1 In the Ninth Circuit, “[t]he district court is given broad discretion in supervising the pretrial
2 phase of litigation” *Continental Lab.*, 195 F.R.D. at 677 (quoting *Miller v. Safeco Title Ins. Co.*,
3 758 F.2d 364, 369 (9th Cir. 1985)). If full compliance with Rule 26(a) is not made, Rule 37(c)(1)
4 mandates some sanction, “the degree and severity of which are within the discretion of the trial judge.”
5 *Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998). The Ninth Circuit reviews a district
6 court’s decision to sanction for a violation of the discovery rules for abuse of discretion which gives
7 “particularly wide latitude to a district court’s discretion to issue sanctions under Rule 37(c)(1).” *Yeti*
8 *by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (citing *Ortiz-Lopez v. Sociedad Espanola*
9 *de Auxilio Mutuo Y Beneficiencia de Puerto Rico*, 248 F.3d 29, 34 (1st Cir. 2001)). The burden is on
10 the party facing discovery sanctions under Rule 37(c)(1) to prove harmlessness. *Id.* at 1107. Exclusion
11 of an expert’s testimony for failure to comply with the requirements of Rule 26(a) is a sanction
12 available to the trial court within its wide discretion under Rule 37(c)(1) even in the absence of showing
13 a bad faith or willfulness. *Id.* at 1106.

14 The district court also has discretion to exclude expert witnesses who have not been timely
15 disclosed in compliance with the court’s scheduling order. *Wong v. Regents of the University of*
16 *California*, 410 F.3d 1052, 1062 (9th Cir. 2005). As the Ninth Circuit recognizes, courts enter
17 scheduling orders “to permit the court and the parties to deal with cases in a thorough and orderly
18 manner, and they must be allowed to enforce them, unless there are good reasons not to.” *Id.*
19 Therefore, when a party fails to identify expert witnesses, and provide the disclosures required by Rule
20 26(a)(2) in accordance with the court’s scheduling order, “[d]isruption to the schedule of the court and
21 other parties in that manner is not harmless.” *Id.*

22 Plaintiff was required, pursuant to Fed. R. Civ. P. 26(a)(1)(A) to provide a computation for each
23 category of her damages claimed without awaiting a formal discovery request. Plaintiff was also
24 required to supplement or correct any disclosures or response in a timely manner if she learned that in
25 some material respect her disclosures were incomplete or incorrect. *See* Fed. R. Civ. P. 26(e)(1)(A).
26 Plaintiff served initial disclosures in this case on July 24, 2012. The initial disclosures are attached as
27 Exhibit “A” to Wal-Mart’s motion. Motion (Dkt. #56) Exhibit “A”. Under the category of Future
28 Medical Expenses, she stated “to be determined.” Under the category of Experts Retained or Specially

1 Employed to Provide Expert Testimony, she responded "none at this time." Plaintiff served
2 supplemental disclosures on August 14, 2012, September 27, 2012, December 21, 2012, and February
3 14, 2013. *Id.*, Exhibits "B" through "E". In each of these supplemental disclosures, the Plaintiff
4 provided identical responses that her future damages were "to be determined" and that she had not
5 retained or specially employed experts to provide expert testimony.

6 Dr. Selznick's report indicates that he first examined the Plaintiff on September 9, 2012. Reply
7 (Dkt. #64) Exhibit "A". Counsel for Plaintiff refers to Dr. Selznick's examination as an IME. Counsel
8 for Plaintiff referred the Plaintiff to Dr. Miciano for an independent medical examination, life care plan,
9 and permanent medical impairment report on August 1, 2012. *Id.*, Exhibit "B", Intake Form. Dr.
10 Miciano examined the Plaintiff in what counsel for Plaintiff describes as two IMEs on August 5, 2012,
11 and August 22, 2012. Dr. Selznick's report was dated February 4, 2013. Dr. Miciano's report is dated
12 February 14, 2013. Yet Plaintiff served a Fourth Supplemental Disclosure February 14, 2013, still
13 claiming he had not retained any expert. Counsel for Plaintiff signed these discovery responses and
14 supplemental disclosures. By signing these disclosures and discovery responses, counsel for Plaintiff
15 certified that to the best of his knowledge, information and belief formed after reasonable inquiry, the
16 disclosure was "complete and correct as of the time it was made." *See* Fed. R. Civ. P. 26(g). Clearly,
17 these disclosures were not complete and correct as of the time made.

18 On July 27, 2012, counsel for Plaintiff sent counsel for Wal-Mart a letter indicating his client "is
19 still experiencing some residual issues from her accident-related injuries; however, she is not actively
20 treating at this time." Motion (Dkt. #56) Exhibit "F". Counsel for Wal-Mart sent a letter to counsel for
21 Plaintiff July 30, 2012, confirming matters discussed at the Rule 26(f) conference and in recent
22 communications confirming Wal-Mart's understanding that, while the Plaintiff "avers to experience
23 some residual issues with her right knee, she has not received any additional treatment for her right
24 knee since 2011" and that Plaintiff would not be asserting a wage-loss claim. *Id.*, Exhibit "G".

25 The parties submitted a Joint Proposed Discovery Plan and Scheduling Order (Dkt. #8) on
26 August 3, 2012, which the court approved in a Order (Dkt. #9). The court approved discovery plan and
27 scheduling order contained a provision for an independent medical examination in Paragraph K. It gave
28 Wal-Mart the opportunity to conduct an independent medical examination under one of two

1 circumstances: first, if it was discovered that Plaintiff was still undergoing medical treatment for
2 injuries alleged from this incident, or second, if Plaintiff claimed to have residual medical issues
3 requiring additional medical treatment. Order (Dkt. #9), ¶K. If neither of two circumstances existed,
4 Plaintiff reserved the right to object to an IME. *Id.*

5 Plaintiff served Wal-Mart with answers to interrogatories September 26, 2012. The Plaintiff
6 verified her answers under penalty of perjury. Motion (Dkt # 56) Exhibit "P". Interrogatory No. 10
7 asked her to list every injury, symptom, or ailment she claimed was a result of the accident. Plaintiff
8 responded: "I injured my right knee and had to have surgery. It still gives me problems from time to
9 time. I also hurt my back and neck, but they seem better." Interrogatory No. 12 asked Plaintiff to
10 identify all healthcare providers or facilities from which she had received treatment *or consulted* since
11 the date of the incident. Plaintiff's answer did not disclose that she consulted with either Dr. Selznick
12 or Dr. Miciano. At the time she signed these verified answers to interrogatories, she had received three
13 separate independent medical examinations. Interrogatory No. 14 specifically asked if Plaintiff claimed
14 to have any permanent injury as a result of the incident at the Wal-Mart store. Plaintiff objected on the
15 grounds the interrogatory called for a medical opinion, but without waiving answered "I don't believe
16 my knee will ever be the same." Interrogatory No. 15 asked the Plaintiff whether she was alleging that
17 she would need any future treatment for any injury she alleged occurred as a result of the incident at the
18 Wal-Mart store, and if so, requested information about the diagnosis and medical reason for future
19 treatment, the nature of the future treatment(s), the cost of future treatment(s), and the name of the
20 doctor or healthcare provider who informed Plaintiff that future treatment would be necessary. Plaintiff
21 responded to "see" her Answer to Interrogatory No. 14. Similarly, Plaintiff was asked to itemize all
22 expenses claimed as a result of the incident in Interrogatory No. 16. Plaintiff's answer referred Wal-
23 Mart to her witness list and document disclosures, and contained the same chart disclosing the names of
24 the healthcare providers and amounts of expenses incurred totaling \$42,290.34 provided with her initial
25 disclosures.

26 Plaintiff's deposition was taken on October 4, 2012. During her deposition, Plaintiff was asked
27 about the current status of her right knee and whether she was still treating. She indicated that she was
28 done seeing Dr. Tingey. Plaintiff's Reply (Dkt. #60) Exhibit "4", Deposition of Kayleen Shakespeare,

1 p. 94. Counsel for Wal-Mart asked the Plaintiff if she was following up with her primary physician, Dr.
2 Ram, and responded that she had recently seen Dr. Ram. *Id.* Plaintiff was specifically asked what Dr.
3 Ram said about her knee. Plaintiff responded that he prescribed Percocet telling her to take it as
4 needed, and to ice it and rest. *Id.* She was then asked how often she needed to use the Percocet and
5 responded she took it “if I do a lot” and sometimes when she slept. *Id.*, p. 95. She testified she took
6 Percocet a couple of times a month. *Id.* She was asked if she agreed that as far as her knee was
7 concerned, that she had pain maybe two days per month and agreed stating “depending on what I do.”
8 *Id.* She did not disclose that she had already been seen and independently evaluated on three separate
9 occasions by Drs. Selznick and Miciano for any problems related to her knee.

10 Under all of these circumstances, the court appreciates that Wal-Mart was understandably
11 surprised with Plaintiff’s February 21, 2013, expert disclosures reflecting examinations by two
12 previously undisclosed doctors had been conducted as early as August 5, 2012. However, counsel for
13 Wal-Mart reasonably offered to stipulate to an extension of the expert witness deadline so it could
14 conduct an IME and retain its own expert to remedy Plaintiff’s failure to disclose her consultations with
15 both doctors and information about recommendations for future surgery, opinions of permanent medical
16 impairment, and future medical expenses. *See* February 27, 2013, letter attached as Exhibit “K” to
17 Wal-Mart’s Motion. The letter cited decisions in this district in which Wal-Mart had successfully
18 obtained orders excluding untimely disclosed future medical damages and evidence of future surgery.
19 However, to avoid motion practice, Wal-Mart proposed that it be permitted to retain an affirmative
20 expert for its case in chief, and that Plaintiff be offered an extension to provide a rebuttal expert. *Id.*
21 The letter confirmed counsel for Wal-Mart’s understanding based on earlier discussions that Plaintiff
22 agreed Wal-Mart could conduct an IME. *Id.*

23 Counsel for Plaintiff responded in a letter dated March 1, 2013, indicating that he had agreed to
24 allow Wal-Mart to retain a medical expert for the sole purpose of rebutting Dr. Selznick’s and Dr.
25 Miciano’s future medical care opinions, and that he was agreeable to allow this expert to conduct an
26 IME for this “sole purpose.” *Id.* Exhibit “M”. However, counsel indicated that he would not agree to
27 stipulate to allowing Wal-Mart to retain a medical expert to address issues in its case in chief. The
28 letter cited cases holding that if the purpose of expert testimony is to contradict expected and

1 anticipated portions of the opposing party's case in chief the witness is not a rebuttal expert. Counsel
2 for Plaintiff took the position that because Wal-Mart had not yet designated an expert in its case in
3 chief, it was precluded from doing so, and limited to rebuttal experts. Because Wal-Mart would not
4 agree to a limited IME or that it had lost the opportunity to designate experts for its case in chief
5 counsel for Plaintiff indicated he would not agree to allow Wal-Mart to schedule an IME "since you
6 expressly stated that this evaluation will address all aspects of my client's damages claim." *Id.*

7 The court finds Plaintiff's arguments too clever by half. In written correspondence, initial
8 disclosures, five supplemental disclosures, and answers to interrogatories, Plaintiff steadfastly claimed
9 that she had disclosed all of her medical providers and medical treatment for injuries she attributed to
10 this accident. At her deposition on October 4, 2012, she testified that once or twice a month her knee
11 bothered her and she took Percocet for it. In light of Plaintiff's prior representations in letters, initial
12 disclosures, supplemental disclosures, formal discovery responses, and deposition testimony, Wal-Mart
13 was sandbagged when Plaintiff disclosed opinions about the need for future knee surgery and future
14 medical expenses exceeding \$228,000 on the last day to disclose experts. The court finds that
15 Plaintiff's failure to timely disclose her consultations with Drs. Selznick and Miciano was neither
16 substantially justified nor harmless. Until February 21, 2013, Wal-Mart relied on Plaintiff's
17 representations that she was claiming medical damages of approximately \$42,000. Wal-Mart made the
18 decision not to retain a medical expert or request an IME based on repeated representations that these
19 were the extent of her damages. Wal-Mart was not on notice until February 21, 2013, of the potential
20 for future medical damages or surgery. What Plaintiff had disclosed up until that point was that she
21 occasionally had problems with her knee and occasionally visited her treating physician, Dr. Ram, who
22 prescribed pain medication she took once or twice a month.

23 The court finds Plaintiff's arguments that the information about her future surgery and medical
24 damages were not reasonably available until February 21, 2013, specious. The intake form for Dr.
25 Miciano indicates that counsel for Plaintiff referred the Plaintiff to Dr. Miciano for an independent
26 medical examination, life care plan, and permanent medical impairment report on August 1, 2012.
27 Medical experts are expensive. The court does not believe counsel for Plaintiff sent his client to two
28 retained experts, one of whom was specifically asked to prepare a life care plan and assess permanent

1 impairment, without the expectation they would opine Plaintiff had a permanent impairment and would
2 need future care and incur future medical expenses. Under all of these circumstances, the court
3 concludes that counsel for Plaintiff engaged in a calculated strategy to deprive Wal-Mart of an
4 opportunity to retain its own experts and conduct an IME which the parties stipulated to if Plaintiff
5 claimed to have residual medical issues requiring additional medical treatment.

6 Plaintiff was not required to serve a Rule 26(b)(2)(a) report until the expert disclosure
7 deadline. However, the expert disclosure deadline did not excuse Plaintiff from her other discovery
8 disclosure obligations. Plaintiff provided incomplete, erroneous and misleading supplemental
9 disclosures and discovery responses which she did not correct in a timely manner. The Plaintiff's
10 failure to disclose even the fact that she was consulting with retained experts whose reports she would
11 produce on the disclosure deadline mislead Wal-Mart to believe this was a \$42,000 damages case, with
12 Plaintiff occasionally seeing her primary treating physician for knee pain she experienced once or twice
13 a month.

14 On the record presented in the moving and responsive papers, the court finds that Plaintiff's
15 discovery disclosures and non-disclosures are at best, materially misleading, and at worst, patently
16 false. Plaintiff's repeated failures to timely disclose was compounded by counsel for Plaintiff's failure
17 to remedy the late disclosures by agreeing to Wal-Mart's suggestion of a stipulation to allow it to retain
18 experts and conduct an IME. Under the circumstances, Wal-Mart's offer to stipulate was a reasonable,
19 even generous, attempt to remedy the unfair surprise Plaintiff's late disclosures caused.

20 A trial is supposed to be a search for the truth. The federal discovery rules and cases construing
21 them are designed to eliminate trial by ambush, and allow the parties to evaluate the merits of their
22 respective claims and defenses. What counsel for Plaintiff did here is indefensible. It will not be
23 condoned by this court. The motion is granted.

24 **IT IS ORDERED:**

- 25 1. Wal-Mart's Motion to Exclude All Evidence Regarding Plaintiff Kayleen Shakespear's
26 Future Surgery, Permanent Medical Impairment, and Future Medical Expenses Pursuant
27 to FRCP 37(c)(1) and FRCP 37(b)(2) [Emergency Motion] (Dkt. #56) is **GRANTED**.

28 ///

Dated this 8th day of July, 2013.

Peggy A. Leen
United States Magistrate Judge